Hwang–DBS Securities Bhd v Tay Ben Chuan

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–159 OF 1998
KAMALANATHAN RATNAM J
6 OCTOBER 2004

Securities — Shares — Sale and purchase — Contra losses — Failure to make full payment — Whether share transactions conducted upon defendant's instructions — Agreement to settle payments — Terms and conditions of settlement — Whether breached

The defendant sought the plaintiff's services to purchase and sell shares. Subsequently, the defendant was indebted to the plaintiff in the total sum of RM1,085,954.80 made up of a sum of RM1,050,000 being the balance of the contra losses and a sum of RM35,958.80 being the arrears of late payment interest calculated up to 3 March 1998. Pursuant to a settlement agreement, one of the ways opted by the defendant to settle the arrears was to transfer three condominium units free of encumbrances. However, it was found that the said units were charged to a bank. The plaintiff instituted this suit against defendant to recover the arrears in question.

Held, allowing the plaintiff's claims:

(1) The various offers of settlement by the defendant clearly showed that the transactions completed by the remisier ('PW3') were upon the instructions of the defendant as there was no documentary evidence to the contrary (see para 19).

(2) The defendant's plea of set-off by way of the three condominium units was rejected. Firstly the plea of set-off was not even pleaded. Secondly the settlement agreement by which the three units of condominium were to have been transferred to the plaintiff could not be put into effect because the defendant breached a term of the settlement agreement by failing to transfer the three units free and unencumbered. The defence that the settlement agreement had superseded the outstanding contra losses must fail, as this was not raised in the pleaded defence (see para 19).

[**Bahasa Malaysia summary**

Defendan telah menggunakan perkhidmatan plaintif untuk urusan jual beli saham. Selanjutnya, defendan berhutang kepada plaintif untuk sejumlah RM1,085,954.80 yang merangkumi RM1,050,000 iaitu baki kerugian kontra dan RM35,958.80 yang merupakan faedah kepada tunggakan yang dikira sehingga 3 Mac 1998. Berikutan suatu perjanjian penyelesaian, salah satu cara yang dipilih oleh defendan untuk menyelesaikan tunggakan tersebut adalah dengan memindah milik tiga unit kondominium kepada plaintif bebas daripada bebanan. Akan tetapi, didapati bahawa unit-unit tersebut telah dicagarkan kepada sebuah bank. Plaintif telah memulakan pertikaian ini terhadap defendan untuk mendapatkan semula tunggakan berkenaan.

Diputuskan, membenarkan tuntutan plaintif:

(1) Pelbagai tawaran penyelesaian yang dimajukan oleh defendan jelas menunjukkan bahawa transaksi-transaksi yang disempurnakan oleh remisier ('PW3') adalah di bawah arahan defendan, dengan ketiadaan keterangan dokumentar yang bercanggah daripadanya (lihat para 19).

(2) Akuan plaintif untuk tolakan melalui tiga unit kondominium ditolak. Pertamanya, akuan tolakan tidak diplidkan. Keduanya, perjanjian penyelesaian dalam mana tiga unit kondominium tersebut sepatutnya dipindah milik kepada plaintif tidak dapat dilaksanakan kerana defendan telah melanggar terma penyelesaian dalam kegagalannya untuk memindah milik tiga unit tersebut bebas daripada bebanan. Pembelaan bahawa perjanjian penyelesaian telah menggantikan kerugian kontra tertunggak tidak terpakai, kerana ia tidak dibangkitkan dalam pembelaan yang diplidkan (lihat perenggan 19).]

Notes

For cases on sale of shares, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 902–913.

Christina Siew (Lim Kean Siew & Co) for the plaintiff.
Chuah Chong Ewe (Syarikat Ng &Anuar) for the defendant.

Kamalanathan Ratnam J:

FACTS

[1] The plaintiff is a stock broking company and a licensed member of the Kuala Lumpur Stock Exchange (KLSE). The defendant appointed the plaintiff as his stock-broker under A/G No TA 2170 for the purposes of trading in shares listed on the KLSE. All share sale and purchase transactions were subject to the terms and conditions prescribed under the KLSE as well as to other terms agreed upon by the parties or in accordance with custom and practice.

[2] It is the plaintiff's case that whilst acting as the defendant's stockbrokers, the plaintiff had, on the instructions of the defendant, purchased and sold shares, the particulars of which the plaintiff had furnished to the defendant by way of contract notes issued by the plaintiff to the defendant.

[3] It was also agreed between the plaintiff and the defendant that all contra losses were to be settled within 14 days from the date of issuance of the contra statements to the defendant and that in the event the defendant failed to settle the said contra losses within the said 14 days, the plaintiff was entitled to charge late payment interest at the rate that might be prescribed by the plaintiff from time to time.

[4] The plaintiff claimed against the defendant for contra losses amounting to RM1,085,954.80 as at 3 March 1998 together with late payment interest at the rate as stated in the contra statements at 13%pa on the principal sum

of RM1,050,000 calculated from 4 March 1998 up to date of full settlement. The plaintiff particularised its claim. The defendant made part payments to the claim.

[5] The plaintiff therefore claimed:-

(a) the sum of RM1,085,954.80 owing as at 3 March 1998;

(b) interest at the rate of 13%pa on the sum of RM1,050,000 calculated from 4 March 1998 to the date of full settlement;

(c) costs; and

(d) such further and/or other reliefs as this honourable court deems just.

[6] Whilst admitting to paying a sum of RM50,000 on 5 February 1998, the defendant denied the rest of the plaintiff's claim and required proof as to how the contra losses were incurred. Alternately it was the defendant's case that if he had purchased shares through the plaintiff, then the plaintiff or its agent had failed to sell the shares in accordance with the defendant's instructions or pursuant to the rules of the KLSE, or the terms and conditions of the commercial contract for sale and purchase of shares. The defendant further contended that by accepting the sum of RM50,000, the plaintiff had agreed that there was no further claim against the defendant.

FINDINGS OF THE COURT

[7] PW1, the senior manager of the plaintiff, testified at the trial. When the case commenced counsel for the defendant was absent. Therefore this witness's evidence was led through his witness statement and there was no cross-examination. However as soon as the 2nd witness for the plaintiff had given his evidence, counsel for the defendant walked in with apologies. I would have thought that having come in late he would apply to court for leave to re-call PW1 for cross-examination. Instead counsel did nothing and this court must therefore find that PW1's evidence was accepted by the defendant as unchallenged.

[8] PW1 testified that the defendant had signed an 'Individual Account Application Form' on 30 September 1996 with the plaintiff and had appointed the plaintiff as his stockbroker to buy and sell shares listed on the KLSE. He confirmed that the remisier handling the defendant's account was one Teh Hock Chuan, the third witness for the plaintiff.

[9] He confirmed that the contract notes and contra statements which were all exhibited in the common agreed bundle of documents (CABD) and pertaining to the defendant's account were sent by ordinary mail to the defendant at his correspondence address as stated by him in the application form that he had filled up. Because the documents were sent by ordinary post there was no acknowledgement from the postal authorities but the plaintiff kept computerised daily records of the contract notes and contra statements that were posted out and the relevant extracts from those daily postal records were included in the CABD.

[10] He confirmed that as at 3 March 1998 the defendant was indebted to the plaintiff in the total sum of RM1,085,954.80 made up of a sum of RM1,050,000 being the balance of the contra losses and a sum of RM35,958.80 being the arrears of late payment interest calculated up to 3 March 1998. Whilst the original contra losses had amounted to RM1,195,280.59, the defendant had made several payments amounting to RM145,280.59 towards part payment of the losses. He also confirmed that a client was given 14 days to settle the contra losses and that the contra statement issued to the client would state expressly the due date for payment before interest was charged. He personally monitored the defendant's account as it had outstanding contra losses and was in default. The witness then took the court through details of the defendant's contra losses with constant cross-reference to the exhibits in the CABD. He also took the court through the detailed payments made by the defendant. Since the defendant had failed to respond to the plaintiff's solicitors' letter demanding payment, the plaintiff had written to the KLSE to post the defendant's name in the defaulters' list. The KLSE maintains a list of all the clients of its members who had defaulted in settling their contra losses with the respective stock broking firms. If a client's name is on the defaulters' list, that client would not be allowed to trade through any member companies of the KLSE until the client settled his losses with his stock broker. Upon receipt of such notification the defendant wrote to the KLSE offering to settle the principal contra losses owing to the plaintiff, then amounting to RM1,181,292 by way of 12 instalment payments by his letter dated 30 October 1997 which letter was also copied to the plaintiff and which said letter was also exhibited in the CABD. The defendant had also enclosed 12 post-dated cheques, one for the sum of RM87,292 and for the sum of RM100,000 each as payment under the proposed instalment scheme. Copies of these cheques were also exhibited.

[11] The plaintiff accepted the proposal in writing subject to the defendant settling the late payment interest. The defendant's first cheque when presented for payment was cleared. However when the next cheque for RM100,000 was presented for payment, the said cheque was dishonoured on the basis that the bank account on which the said cheque was drawn had been closed.

[12] Following the dishonour of the said cheque, the defendant then re-negotiated with the general manager of operations of the plaintiff and arrived at the following terms that:

(1) the defendant would pay a sum of RM50,000 towards part settlement of his contra losses;

(2) the parties would execute a settlement agreement whereby the defendant was to transfer to the plaintiff three condominium units at Langkawi, free from encumbrance, as settlement of the balance due and owing from the defendant to the plaintiff.

[13] The defendant duly complied by paying the RM50,000. He however failed to transfer the three condominium units. The defendant also failed to respond to the plaintiff's solicitors' letter demanding the balance payment. But subsequently the defendant's solicitors forwarded to the plaintiff s solicitors

the signed settlement agreement and the necessary documents for the transfer to be effected. However the plaintiff refused to accept the documentation because the defendant had failed to transfer the condominium units free of encumbrance as they were charged to the Oriental Bank Berhad. Since the proposed settlement agreement failed, the plaintiff sued for the amount claimed. As I had stated earlier all this evidence as stated by PW1, was unchallenged.

[14] The second witness for the plaintiff namely its executive director of operations confirmed PW1's evidence. The thrust of the defendant's case was that the second negotiated settlement is what the plaintiff ought to stick to and that since the plaintiff refused to carry through the settlement, the plaintiff ought to have refunded the payment of RM50,000. Further it was also the case of the defendant that since there was no mention of a time frame by which time the defendant ought to transfer the three units of condominium to the plaintiff, the plaintiff ought to have been patient and not reject the settlement agreement.

[15] What the defendant has failed to appreciate is that when he returned the documents relating to the transfer of the three units of condominium, he had failed to maintain his undertaking to transfer the three units free of encumbrance. The defendant had failed to furnish the plaintiff a letter from the bank that the charges over the said properties had been discharged.

[16] The 3rd witness for the plaintiff was the remisier who handled the defendant's account. He confirmed having purchased the numerous shares upon the instructions of the defendant. He testified that the defendant would usually instruct him over the telephone. The said instructions would include the name of the share, the number of lots to be bought or sold as the case may be and the intended transaction price. Once the transaction was completed he would call up the defendant over the telephone to inform him of the same. He confirmed that the defendant had failed to settle the sums as claimed by the plaintiff. He refuted the defendant's allegation that the said shares were purchased without the defendant's instructions. He testified that if he had indeed purchased the said shares without instructions, the defendant could have lodged a complaint to the manager and/or to the KLSE against him for unauthorised transactions. However to date there were no complaints lodged by the defendant against him.

[17] After the plaintiff had closed its case counsel for the defendant informed the court that he was not calling the defendant and would be submitting based mainly on the documentary evidence.

[18] Since the defendant was not adducing evidence, I directed the plaintiff to submit. To my mind the evidence of PW1 remained unchallenged. Since counsel knew that he was not calling the defendant at least he ought to have sought the court's leave, which would have been readily given, to cross-examine PW1. After all the plaintiff had not as yet closed its case and the defence could have applied to recall PW1 for cross-examination.

[19] The defendant did not give evidence to contradict the plaintiff's witnesses. The various offers of settlement by the defendant clearly showed that there

was no doubt the transactions completed by PW3 were upon the instructions of the defendant. Besides the story of the defence that PW3 transacted without instructions cannot stand because the defendant did not testify to confirm his instructions to counsel. The plaintiff was not given an opportunity to cross-examine the defendant. Therefore all allegations put by the defence to the plaintiff's witnesses must be rejected unless borne out by any documentary evidence. As for the plea of set-off by way of the three condominium units, I must reject this argument of the defence. Firstly the plea of set-off was not even pleaded. Secondly the settlement agreement by which the three units of condominium were to have been transferred to the plaintiff could not be put into effect because the defendant breached a term of the settlement agreement by failing to transfer the three units free and unencumbered. I find that the defence that the settlement agreement had superseded the outstanding contra losses must fail, as this was not raised in the pleaded defence. I therefore granted the plaintiff an order in terms of prayer (a), (b), (c) and (d).

Plaintiff's claims allowed.

Reported by M Maheswaran